



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MAY 23, 2023

IN THE MATTER OF:

Appeal Board No. 628437

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination, holding the claimant eligible to receive benefits, effective February 21, 2022. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant voluntarily separated from employment without good cause; and in the alternative, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed February 28, 2023 (), the Administrative Law Judge granted the employer's application to reopen A.L.J. Case No. 022-28856, overruled the employer's objections and sustained the initial determination of eligibility.

The employer appealed the Judge's decision to the Appeal Board, insofar as it overruled the employer's objections and sustained the initial determination of eligibility.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed as a salaried teaching assistant and paraprofessional for the employer, a municipal school district for over

eight years. The claimant was born and raised as a Muslim. She has received prior vaccinations, including a vaccination for Tetanus.

In August 2021, the NYC Commissioner of Health implemented a mandate requiring all Department of Education personnel be vaccinated against the COVID-19 virus by September 27, 2021. On September 1, 2021, September 12, 2021, and September 23, 2021, the claimant was notified by the employer that she was required to have one dose of the vaccine on or before September 27, 2021, modified subsequently to October 4, 2021, or she would be removed from the payroll and placed on unpaid leave.

The claimant understood that she could not continue her employment without a COVID-19 vaccination. The claimant submitted a request for a religious exemption. The claimant did not want to put "different chemical (s)...different mix of the vaccine, uh, for my religion...I'm not allowed to have that in my body." On September 25, 2021, the employer denied the request. The claimant did not receive the vaccination as required. Consequently, the claimant was placed on leave without pay as of October 4, 2021.

OPINION: The credible evidence establishes that the claimant's employment ended on October 4, 2021, because she refused to comply with the COVID-19 vaccine mandate. There is no dispute that the claimant was aware of this requirement, that the requirement applied to her as a paraprofessional within the New York City school system, and that she could not continue her employment if she did not comply.

As the claimant was aware of the vaccine mandate and that she could be separated from employment if she chose not to comply and the claimant elected not to comply, we find that the claimant provoked her own discharge. A provoked discharge occurs when a claimant voluntarily violates a legitimate known obligation, leaving the employer no choice but to discharge her. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to a disqualification from receiving benefits. (See Matter of DeGrego, 39 NY2d 180 [3d Dept.1976]).

The obligation in this matter was the employer's vaccine requirement which was established for the purpose of complying with the New York City Commissioner of Health's mandate that all public employees of the City of New York, including New York City Department of Education personnel, be vaccinated

against COVID-19 during the worldwide pandemic. The Courts have long held that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease (See *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo*, 64 NY2d 233, 237-40 [1984]). Because of the severity of the ongoing COVID-19 crisis and healthcare providers' need to protect the health of their employees, the mandate that all Department of Education personnel be vaccinated against COVID-19 was justified by a compelling governmental interest. Therefore, we find that the employer's

requirement for the claimant to be vaccinated was a legitimate obligation and the employer had no choice but to end the claimant's employment when she refused to become vaccinated.

We disagree that the claimant's religious beliefs provided her with good cause for refusing the COVID-19 vaccination. The Supreme Court of the United States has held that "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that provided a law is neutral and not aimed at a specific religion, is generally applicable, and pertains to an area of law the government can regulate, it cannot be preempted by a religious practice. There is no allegation that the City of New York cannot regulate the Department of Education, that the law is not generally applicable to those working in public schools, or that it targeted a specific religion. Moreover, the United States Supreme Court has denied requests to block the vaccine mandate for New York City teachers. (See *Keil v. City of New York*, No. 21A398, 595 U.S. \_\_\_, March

7, 2022; *Maniscalco, v. NYC Dept of Education*, No. 21-854, 596 U.S. \_\_\_, April 18, 2022).

We further note that the claimant's request for a religious exemption was undermined by her own behavior which ran contrary to her stated beliefs. For example, although she contended her faith precluded vaccinations due to the chemicals within the vaccines, she had been vaccinated previously. See Appeal Board No. 626048 (holding that the claimant engaged in health practices that contravened her religious beliefs where she was vaccinated against the flu). Therefore, we find that the claimant's personal beliefs do not outweigh the employer's interest in protecting the health and safety of employees and students and that the claimant has not substantiated that she had good cause for ending her continued employment. (See Appeal Board Nos. 623435 and 621525).

Further, even if the doctrine of provoked discharge did not apply, the Court has held that a claimant who fails to take a step that is reasonably required for continued employment is deemed to have voluntarily separated from employment without good cause (See *Matter of Wackford*, 284 AD2d 770 [3d Dept 2001]). The claimant could have preserved her employment by complying with the employer's requirement to become vaccinated.

Accordingly, we conclude that the claimant voluntarily separated from her employment without good cause and that the issue of misconduct is rendered academic.

**DECISION:** The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant voluntarily separated from employment without good cause, is sustained, effective October 4, 2021.

The initial determination, holding the claimant eligible to receive benefits, effective February 21, 2022, is overruled.

The claimant is disqualified from receiving benefits, effective October 4, 2021, until the claimant has subsequently worked in employment and earned remuneration at least equal to 10 times the claimant's weekly benefit rate. Employment and earnings from non-covered, excluded or self-employment will not count.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER